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No. 90-1463

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNER CABLE COMMUNICATIONS INC.,
Petitioner,

v.

CITY OF NICEVILLE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF COMMUNITY ANTENNA TELEVISION ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION OF COMMUNITY ANTENNA TELEVISION ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Community Antenna Television Association ("CATA") hereby moves, pursuant to Rule 37.2 of the Rules of the Court, for leave to file the attached brief as *amicus curiae* in support of the petition of Warner Cable Communications Inc. ("Warner") for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Warner has consented to the filing of the brief and its consent is being filed with the Clerk. Respondent has withheld its consent.

CATA is a national organization that represents cable television system operators serving over 40 million subscribers throughout the country, in every state and in the U.S. territories. Many of these operators currently face —or are likely to face in the future—attempted over-

builds by a government-owned cable system similar to that proposed by the respondent in this case. Small market operators represented by CATA are particularly vulnerable to either displacement or intimidation by a cable system subsidized below cost by a municipality. Such intimidation can take either the form of actual municipal construction of a cable overbuild, or the threat to do so, which can be used to distort the franchise renewal process. CATA members are often one of very few local editorial voices, if not the only such voice, independent of the government in their communities.

The attached brief brings relevant matter to the attention of the Court that has not already been brought to the Court's attention. Accordingly, the motion to file the attached brief should be granted.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF COMMUNITY ANTENNA TELEVISION ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Community Antenna Television Association ("CATA") submits this brief as *amicus curiae* in support of Warner Cable Communications Inc. ("Warner"), petitioner for a writ of certiorari in the above-referenced case.

CATA is a national organization that represents cable television system operators serving over 40 million subscribers throughout the country, in every state and in the U.S. territories, before Congress, the Federal Communications Commission and the courts. Many of these operators currently face—or are likely to face in the future—attempted overbuilds by a municipally owned cable system similar to that proposed by the City of Niceville, Florida, respondent in this case.

CATA has historically focused its efforts not on representing primarily the operators that control the major urban cable systems, but rather on representing small market cable operators. These small market operators are particularly vulnerable to either displacement or intimidation by the threat of an overbuild by a municipality that has the power to annihilate any competition through deep financial pockets based on the municipality's power to tax coupled with aggressive use of its pervasive regulatory authority over its competitor.

In these small markets, moreover, the cable operator is often the only local electronic editorial voice that is independent of the government. There are no broadcast television stations in many markets in which CATA members operate. In others, the cable operator provides one of very few local electronic, or even print, editorial voices. CATA members are providing local news and coverage of town councils, school board meetings and other local events and issues. One CATA member, Guam Cable Television, for example, recently received one of journalism's prestigious Polk Awards for 200 local reports exposing illegal transfer of public lands into private hands.[1]

CATA's *amicus* brief will illustrate that the issues Warner asks this Court to resolve will have a substantial nationwide impact on the speech rights of cable operators, far beyond the particular Florida community where the City of Niceville is seeking to supplant Warner's cable system.

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[1] See The Washington Post, Mar. 16, 1991, at A13.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S DECISION WILL ENCOURAGE OTHER CITIES TO DISPLACE OR CHILL THE SPEECH OF INDEPENDENT CABLE OPERATORS

A. Municipalities Will Use Their Powers Of Regulation And Taxation To Favor Their Own Cable Systems And Drive Out Independent Cable Voices

The central issue in this case is the constitutionality of allowing a government speaker to drive out a private speaker through the use of its powers of taxation and regulation. In such situations, which are faced by CATA members, there is no way that a privately owned cable system can survive.

To find, as the Eleventh Circuit did without even a trial on the merits of Warner's allegations, that a city can always be presumed to act fairly as both a competitor in the field of cable speech and an unbiased regulator of the competitor over which it holds pervasive powers—including the life and death power of franchise renewal—is a fantasy. Competition is only fair if all cable operators that are franchised in a particular market are subject to the same franchise fees, the same regulations, and the same standards of conduct. Here, however, the record shows that Niceville's proposed system would operate at below-cost rates and that the city would use tax revenues to subsidize operating deficits and to meet its construction bond obligations. CATA members cannot "compete" against such a system.

Municipalities hold, under the federal Cable Act adopted in 1984,[2] extremely broad powers over their cable franchisees. Cities can assess a franchise fee of up to five percent of an independent cable operator's gross

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[2] Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-559 (1991) ("Cable Act").

revenues. In the franchises they grant, they can set customer service requirements at a stringent threshold. They can set and enforce aggressive construction deadlines and line extension policies that require cable operators to extend service into portions of a community that must be economically subsidized because of the low density of homes per mile. A municipality often is entitled by a franchise's terms to review in detail the financial records of the cable operator. When a municipality becomes a competitor to an existing franchised cable operator, all of these powers to regulate their competitor become powers to destroy.

This Court has recently reiterated that cable operators are members of the press. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991) ("Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.' "). While a serious imbalance created by a municipality's powers of regulation and taxation may be tolerated in other competitive contests between municipality-owned services and competing independently regulated entities (for example, in garbage collection services), it is not acceptable in the First Amendment media context.

In the case before the Court, Niceville will be acting as both regulator and competitor. It intends to cross-subsidize operating deficits from general tax revenues, including a $2 million bond issue to construct the cable system supported by tax revenues. The city will impose a five percent franchise fee on Warner but it will bear no similar economic burden. Niceville's own cable system will enjoy tax immunity, while Warner will pay property, sales and income taxes. As its regulator, the city can compel Warner to reach subscribers in less densely populated areas, has the right to inspect Warner's books and records and ask for other confidential business information, dictates and oversees Warner's level of cus-

tomer service, has the power in its franchise to regulate its competitor's rates, and holds the ultimate power of denial of renewal of Warner's franchise. This could lead to governmental control of the electronic press in Niceville.

To use the Court of Appeals' own analogy, at a minimum, a trial is needed in this case to determine whether in fact the city of Niceville's particular governmental "soapbox" is so powerful and inherently predatory that it will necessarily overwhelm Warner's existing private electronic "soapbox," as well as prevent other similar private electronic soapboxes from being established. A trial will determine whether the government, through its taxing and regulatory powers, will in this particular community necessarily end up as the only remaining cable speaker—indeed, the only remaining video speaker, since there is no local television broadcasting station in Niceville.

B. Even Where A City Does Not Build A Competing Cable System, The Eleventh Circuit Decision Will Encourage Cities To Threaten To Do So In Order To Undermine The Cable Operator's Franchise Renewal Protections In The Federal Cable Act

Based on the experience of CATA's members, the fallout from the Eleventh Circuit's decision, were this Court not to reverse it, would go beyond simply encouraging many other municipalities to undertake similar city-owned overbuilds. Even in those communities where municipal cable systems are not actually financed and constructed, city franchising authorities will use the Eleventh Circuit's decision as leverage to undermine the scheme set up by the Cable Act for a franchise renewal process that protects cable operators against municipal overreaching.

Cities would be likely to use the threat of establishing a municipal cable system to achieve their ends without needing to follow through on that threat. A city can assert that unless the cable operator agrees to franchise

conditions that are not required by—or may even be contrary to—the Cable Act in order to gain renewal, the city will use its taxing power to raise funds for a municipally owned competitor that will drive the independent operator out of business.

Congress in 1984 found that the cable franchise renewal process had been abused by cities, who had sought to extract programming and other inappropriate and onerous concessions as a *quid pro quo* for grant of a franchise.[3] One of the basic purposes of the Cable Act was to "establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this [title]." [4]

Under the scheme established by Section 626 of the Cable Act, [5] a cable operator at the end of its current franchise term need only provide the city with basic information about its franchise term performance, its past customer service, and its capability to carry out a reasonable future proposal. The Cable Act has procedural protections to insure that the record of a renewal proceeding is limited to consideration of these factors, and does not include judgments as to the value of specific programming choices made or proposed by the cable operator.

If the Eleventh Circuit's decision stands, a municipality can use it to bypass the federal Cable Act's franchise renewal criteria and due process safeguards. If a city cannot find grounds for nonrenewal under the Cable Act, it can threaten to subsidize a below-cost municipal cable system to drive out competition, unless a cable operator provides whatever programming services the city wants and sells them in a manner desired by the city. Faced

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[3] See H.R. Rep. No. 934, 98th Cong., 2nd Sess. at 21-22 (1984); reprinted in 1984 U.S. Code Cong. & Admin. News 4655, 4658-59.

[4] 47 U.S.C. § 521(5).

[5] 47 U.S.C. § 546.

with this harassment potential, it is difficult, particularly for smaller cable operators, to continue to assert their independent right to choose and market cable programming services as these operators, as independent members of the press, determine should be provided to their communities. Cities will thus be tempted once again to impose the kinds of content-based judgments and conditions that the Cable Act was designed to eliminate from the franchising process. This intimidation is already occurring. The Eleventh Circuit's decision will only accelerate it.

II. SIMILAR MUNICIPAL CABLE OVERBUILD ISSUES ARE PENDING BEFORE SEVERAL OTHER COURTS, WHICH NEED GUIDANCE IN THIS AREA

Litigation is pending in federal and state courts in several jurisdictions based on this type of overreaching by municipalities in their attempt to supplant the speech of independent cable operators. Municipal cable system overbuild cases that involve not only First Amendment claims but also claims based on instances of predatory municipal actions that raise antitrust, due process, breach of contract and other claims, are pending in the Fourth Circuit,[6] the Eighth Circuit,[7] and federal district courts in Missouri,[8] Michigan,[9] and Kentucky.[10]

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[6] *Madison Cablevision, Inc. v. City of Morganton*, No. 90-1500, *appeal from* Case No. SH-C-86-5, 1986 WL 22246 (W.D.N.C. 1990). *See also Madison Cablevision, Inc. v. City of Morganton*, 386 S.E.2d 200 (N.C. 1989).

[7] *Paragould Cablevision v. City of Paragould*, 1991-1 Trade Cas. (CCH) ¶ 69,403 (8th Cir. Apr. 15, 1991), *petition for rehearing en banc* filed May 10, 1991.

[8] *Rolla Cable System, Inc. v. City of Rolla*, No. 89-2101C(2) (E.D. Mo. Apr. 15, 1991) (cross appeals to 8th Cir. lodged).

[9] *Bresnan Communications v. City of Negaunee*, M84-219-CA2 (W.D. Mich.) (partial summary judgment granted Aug. 17, 1989; First Amendment, equal protection, due process claims pending).

[10] *TeleScripps Cable Co. v. City of Glasgow*, No. C-88-1069-BG(M) (W.D. Ky. filed Nov. 4, 1988).

Other suits are pending in state courts. Since there are now well over 100 communities in which municipally owned cable systems either have been constructed or are being considered,[11] this litigation is likely to continue.

CATA believes that a First Amendment issue is raised for trial whenever a cable company alleges that a city intends to silence its speech through a combination of regulation of the company's activities and unfair economic competition to it. The Eleventh Circuit, to the contrary, has stated: "Warner fails to assert a protected first amendment interest even if the projected City-owned system will surely render Warner's continued operation in Niceville economically infeasible."[12]

III. CABLE'S CRITICAL ROLE AS A FIRST AMENDMENT SPEAKER IS THREATENED BY THE ELEVENTH CIRCUIT'S DECISION

Millions of Americans experienced cable as the medium of choice for news and information during the Congressional debates on C-SPAN on the Persian Gulf War, and the subsequent coverage of that war by Cable News Network (CNN). Some government officials were highly critical of that coverage. This recent phenomenon illustrates that the cable medium cannot be held to be of such little First Amendment consequence that a municipality is given *carte blanche* by a federal court, without even a trial on the merits, to drive it out of business, or direct its editorial policy, so that the municipality can become the preferred—and potentially the sole—cable speaker. This decision could lead to cities telling cable operators whether they can carry CNN or other national or regional satellite-delivered networks, and threatening to

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[11] See Paul Kagan Associates, *Cable TV Franchising*, Mar. 25, 1991 (attachment on "Cable TV Municipal Overbuilds").

[12] *Warner Cable Communications Inc. v. City of Niceville*, 911 F.2d 634, 636 (11th Cir. 1990); See Warner Petition for Certiorari, Appendix p. 5a.

drive them out of business through a municipal "competitor" if they do not comply.

Cable today is not only acting as a critical editorial source of information on national and regional events. Local cable systems are also, as noted above, increasingly providing local news and coverage of local events and offering a forum for local candidates—in some markets as the only electronic media outlet for such information. The Eleventh Circuit's decision is extremely hostile to cable as a free speech medium, holding in essence that an independent cable operator can never make a case that a municipality proposes to use predatory economic competition to drive it out of business. Such a holding cannot be allowed to stand if the Court wishes cable television to continue as a robust purveyor of speech.

CONCLUSION

For the foregoing reasons, Warner's petition for a writ of certiorari should be granted.

Respectfully submitted,

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